

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re Terrorist Attacks on September 11, 2001	03 MDL 1570 (GBD)(SN) ECF Case
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This document relates to: All Cases

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' PETITION FOR A
WRIT OF *HABEAS CORPUS AD TESTIFICANDUM***

By Order dated June 10, 2019, ECF No. 4582, this Court ordered any party seeking to make an application for relief related to the deposition of six individuals currently in the custody or protection of the U.S. Government to be filed by July 1, 2019. Pursuant to that Order, Plaintiffs submit this Memorandum of Law in support of the Petition for Writ of *Habeas Corpus Ad Testificandum* for the production of Khalid Sheikh Mohammed, Abd al Aziz Ali, and Mustafa Ahmed al Hawsawi, currently in the custody of Secretary of Defense Mark Esper at the Joint Task Force detention facility at Guantanamo Bay, Cuba (“GTMO”), to provide deposition testimony at that facility. By letter dated June 25, 2019, the U.S. Department of Justice, on behalf of the United States of America, stated that it would not object to these depositions at this time until the deponents state their willingness to participate in the petitioned for depositions. See Declaration of Jerry Goldman dated July 1, 2019, (“Goldman Decl.”) Exhibit A, Letter from Sarah Normand to Plaintiffs’ Executive Committees, dated June 25, 2019.¹

I. LEGAL STANDARD

“The authority of the court to compel the attendance of an inmate witness . . . is to be found in a conjoint reading of 28 U.S.C. § 2241(c)(5) and 28 U.S.C. § 1651(1)” through the issuance of a writ of habeas corpus *ad testificandum*. *United States v. Gotti*, 784 F. Supp. 1011, 1012 (E.D.N.Y. 1992); *Atkins v. City of New York*, 856 F. Supp. 755, 757 (E.D.N.Y. 1994). In addition to compelling production of a prisoner for a court appearance, the court may also issue a writ of *habeas corpus ad testificandum* for the purpose of taking an oral deposition. See *Calvente v. Suffolk Cnty. Corr. Facility*, No. CV 15-2024, 2017 U.S. Dist. LEXIS 75472, at *2 (E.D.N.Y. May 16, 2017) (issuing a writ to the Superintendent of the Marcy Correctional Facility to have a prisoner delivered to Sing Sing Correctional Facility to sit for a deposition);

¹ Plaintiffs have contacted counsel for Khalid Sheikh Mohammed, Abd al Aziz Ali, and Mustafa Ahmed al Hawsawi to help facilitate the depositions.

Waste Mgmt. of La. V. River Birch, No. 11-2405, 2017 U.S. Dist. LEXIS 58842, at *7 (E.D. La. Apr. 13, 2017) (citing *Hasso v. Retail Credit Co.*, 326 F. Supp. 1179 (D. Del. 1971)) (“The Court may also issue a Writ of *Habeas Corpus Ad Testificandum* for the purpose of taking an oral deposition.”); *In re Rothstein Rosenfeldt Adler, P.A.*, No. 11-61338, 2011 U.S. Dist. LEXIS 99651, (S.D. Fla. Sept. 6, 2011) (discussing issuance of a writ for *habeas corpus ad testificandum* for pretrial deposition). A writ of *habeas corpus ad testificandum* commands a prisoner’s custodian to produce the witness and as such is the proper procedure here, as opposed to a subpoena, which only commands a prospective witness’s attendance. *See Gotti*, 784 F. Supp. at 1012. This is also the proper procedure for obtaining testimony from individuals in custody at GTMO. *See United States v. Uzair Paracha*, 03-Cr-1197, 2006 U.S. Dist. LEXIS 1, at *14-26 (S.D.N.Y. Jan. 3, 2006); *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

“Whether a writ of *habeas corpus ad testificandum* is necessary is ‘committed to the sound discretion’ of the court, taking into account such factors as: ‘(i) whether the prisoner’s presence will substantially further the resolution of the case; (ii) the security risks presented by the prisoner’s transportation and safekeeping; and (iii) whether the suit can be stayed until the prisoner is released without prejudice to the cause asserted.’” *Sec. Inv’r Prot. Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 496 B.R. 713, 723 (Bankr. S.D.N.Y. 2013) (quoting *Atkins*, 856 F. Supp. at 757); *see also Gotti*, 784 F. Supp. at 1012-13 (the court may also consider “whether the presence of the prisoner will advance the disposition of the case; . . . whether the witness to be called could offer evidence that was relevant”).

II. THE COURT SHOULD EXERCISE ITS DISCRETION IN GRANTING PLAINTIFFS’ PETITION FOR A WRIT OF HABEAS CORPUS AD TESTIFICANDUM

Plaintiffs seek to depose Khalid Sheikh Mohammed, Abd al Aziz Ali, and Mustafa Ahmed al Hawsawi (collectively referred to as the “Deponents”), all of whom are currently

detained at GTMO. Khalid Sheikh Mohammed was a senior al Qaeda recruiter, financier, operational planner for al Qaeda's global terrorist network, and the alleged mastermind of the September 11, 2001 terrorist attacks (the "September 11 Attacks").² Ali Abd al-Aziz Ali was a senior member and planner of al Qaeda who helped plan and facilitate al Qaeda operations and personnel. Al-Aziz Ali also allegedly facilitated the travel and finances for at least 13 of the 9/11 hijackers as they left the United Arab Emirates (UAE) for the United States.³ Mustafa Ahmed al Hawsawi was a senior al Qaeda member who supported al Qaeda's terrorist network as a facilitator, financial manager, and media committee member.⁴ This support allegedly included the movement and funding of September 11, 2001 hijackers to the United States.

Plaintiffs anticipate the Deponents will provide highly relevant testimony based on their positions within the al Qaeda organization and their involvement in organizing and facilitating the September 11 Attacks. Plaintiffs intend to depose these witnesses at GTMO if possible, or alternatively by telephone or video conference. As such, the Deponents will not require transportation or safekeeping. In addition, because the Deponents have all been charged with war crimes since their initial detainment at GTMO over twelve years ago, staying this litigation until their release is impractical.

² See, e.g., Memorandum from Dep't of Def. on Detainee Assessment to Commander of U.S. Southern Command (Dec. 8, 2006) (citing *The Guantanamo Docket*, The New York Times, <https://www.nytimes.com/interactive/projects/guantanamo/detainees/10024-khalid-shaikh-mohammed> (last visited June 25, 2019)).

³ See, e.g., *id.* (citing *The Guantanamo Docket*, The New York Times, <https://www.nytimes.com/interactive/projects/guantanamo/detainees/10024-khalid-shaikh-mohammed> (last visited June 25, 2019)).

⁴ See, e.g., *id.* (citing *The Guantanamo Docket*, The New York Times, <https://www.nytimes.com/interactive/projects/guantanamo/detainees/10011-mustafa-ahmed-al-hawsawi> (last visited June 25, 2019)).

Currently, the Deponents face joint charges before the capital military commission in connection with their alleged roles in the September 11 Attacks. *See* Goldman Decl., Exhibit A, Letter from Sarah Normand to Plaintiffs' Executive Committees, dated June 25, 2019, at p. 2. By letter dated June 25, 2019, the U.S. Government stated it will withhold any objection until the Deponents state their willingness to participate in the petitioned for depositions. *See id.* Plaintiffs' counsel will work with the Government to ensure appropriate security measures are adhered to and logistical concerns are addressed.

III. CONCLUSION

In light of the foregoing, Plaintiffs respectfully request that the Court issue a Writ of Habeas Corpus *Ad Testificandum* directing Secretary of Defense Mark Esper to produce Khalid Sheikh Mohammed, Abd al Aziz Ali, and Mustafa Ahmed al Hawsawi for depositions, at the Joint Task Force detention facility at Guantanamo Bay, Cuba.

Dated: July 1, 2019

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